(20)

Supreme Court, U.S.
FILED
NOV 12 19[illegible]
CLERK

No. 95-1503

In The

Supreme Court of the United States

October Term, 1996

SHERIFF RICHARD MACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

DAVID T. HARDY
8987 E. Tanque Verde, Ste. 265
Tucson, AZ 85749
Tel. (520) 749-0241
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

AUTHORITIES CITED iii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I 18 U.S.C. §922(s) Violates Principles of Federalism Underscored By The Tenth Amendment ... 2

A. 18 U.S.C. §922(s) Cannot Be Justified Under Decisions Antedating New York v. United States, 505 U.S. 144 (1992) 2

1. Statutes Generally Applicable, Or Allowing Valid Alternatives 2

2. Statutes Requiring Non-Discriminatory Application By State Adjudicators: *Testa* and *FERC* 3

B. 18 U.S.C. §1922(s) Violates The Parameters Of Federalism As Recognized By This Court In *New York v. United States* 6

1. 18 U.S.C. §922(s) Imposes Substantial, Nonministerial, Duties Upon State Officials, In Violation Of The Tenth Amendment 6

2. The Attempt to Distinguish New York Fails 8

C. 18 U.S.C. §922(s) Presents a Far More Egregious Violation of Federalism Than Was Present in *New York* 12

D. There Is No Historical Precedent For The Imposition Of Federal Duties Upon State Officers Pursuant To The Commerce Clause 13

TABLE OF CONTENTS – Continued

Page

1. Voluntary, Part-Time Employment Of State Employees By The Federal Government 14

2. Naturalization 15

II The Commerce Power Does Not Justify A Federal Mandate That A State Official, Precluded By Statute from Interfering With Commerce, Regulate Commerce To Federal Specification 16

III The Unconstitutional Portions Of 18 U.S.C. §922(s) Cannot Be Severed From The Valid Portions 18

A. Severance Would Yield A Statute Which Congress Refused To Enact 19

B. Severance Would Yield A Statute With Disadvantages Which Congress Did Not Weigh 19

C. Severance Would Create A Statute Containing Inconsistencies And Incongruities 20

CONCLUSION 20

AUTHORITIES CITED

CASES

Alaska Airlines v. Brock, 480 U.S. 678 (1987) 19

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 18

Coyle v. Oklahoma, 221 U.S. 559 (1911) 3

Craig v. Boren, 429 U.S. 190 (1976) 18

Davis v. Hidden, 124 Ariz. 546, 606 P.2d 36 (1979) 5

FERC v. Mississippi, 456 U.S. 742 (1982) 3, 4, 5, 16

Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 70 (1984) 2, 3, 10, 16

Gregory v. Ashcroft, 501 U.S. 452 (1991) 2

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).....3, 4, 16, 17

Kinsella v. Singleton, 361 U.S. 234 (1960) 17

New York v. United States, 505 U.S. 144 (1992) ... *passim*

Nordlinger v. Hahn, 505 U.S. 1 (1992) 18

Puerto Rico v. Brandstad, 483 U.S. 219 (1987) 7

Reid v. Covert, 354 U.S. 1 (1957) 17

Solorio v. United States, 483 U.S. 435 (1987) 17

Stark v. Chesapeake Ins. Co., 11 U.S. (7 Cranch) 420 (1813) 15

Taylor v. Beckham, 178 U.S. 548 (1900) 13

AUTHORITIES CITED – Continued

Testa v. Katt, 330 U.S. 386 (1947) 3, 5
Toth v. Quarles, 350 U.S. 11 (1955) 17
U.S. Term Limits v. Thornton, 115 S.Ct. 1482 (1995) 13
United States v. Oman, 91 F.3d 1320 (9th Cir. 1996) 7

CONSTITUTIONAL PROVISIONS

Del. Const. Art. II §§5, 8 (1792) 15
Ga. Const. Art. I § 10 (1789) 14
Ky. Const. Arts. I, II (1792) 15
Md. Const. Amend. II (1792) 14
Pa. Const. Art. I §5 (1790) 14
S.C. Const. Art. II §2 (1790) 14
U.S. Const. Art. IV, §2 7
U.S. Const. Amendment 10 ..... *passim*
U.S. Const. Art. I, §8, cl. 18 17
U.S. Const. Art. I, §8, cl. 4 15

STATUTES AND REGULATIONS

12 Hening's [Virginia] Statutes at Large 260 15
12 Hening's [Virginia] Statutes at Large 694-95 14
18 U.S.C. §3182 7
18 U.S.C. §921(a) 6
18 U.S.C. §922(s) ..... *passim*
18 U.S.C. §925A 6
18 U.S.C. §928 18

AUTHORITIES CITED – Continued

59 Fed. Register 9498 (Feb. 28, 1994) 6

60 Fed. Register 10,786 (Feb. 27, 1995) 6, 11

Act of June 18, 1798, 1 Stat. 567 15

Arizona Revised Statutes § 11-441 5

Arizona Revised Statutes § 11-641 10

Arizona Revised Statutes § 11-642 10

Arizona Revised Statutes § 13-3108 6

LEGISLATIVE PROCEEDINGS

139 Cong. Record H9097 19

139 Cong. Record H9101 19

139 Cong. Record H9102 19

139 Cong. Record H9107-8 19

139 Cong. Record H9129 19

H.R. 7, 102d Cong., 1st Sess 20

Public Utilities Regulatory Policy Act, Pub. L. 95-617, 92 Stat. 3119 ..... 3, 4, 5

TREATISES AND ARTICLES

1 Letters and Other Writings of James Madison (1865) 9, 13

Brief of the United States, *New York v. United States*, No. 91-543 1

Bureau of Justice Statistics, Identifying Persons, Other Than Felons, Ineligible to Purchase Firearms: A Feasibility Study (May 1990) 8

AUTHORITIES CITED – Continued

Op. Ariz. Att'y Gen. 57-60 5

Op. Ariz. Att'y Gen. 57-23 5

Op. Ariz. Att'y Gen. 68-14 5

The Federalist No. 1 (Hamilton) 13

The Federalist No. 36 (Hamilton) 14

U.S. Constitution Sesquicentennial Comm'n, History of the Formation of the Union Under the Constitution (1941) 14

William Swindler, Sources and Documents of United States Constitutions (1973) 15

SUMMARY OF ARGUMENT

In briefing *New York*, the United States projected for the Court its vision of the quintessential Tenth Amendment violation: compelled State "implementation of federal policies regulating private activity, which would transform state administrative bodies into 'field offices of the national bureaucracy.' " Brief of the United States, *New York v. United States*, at 36-37. The United States here reverses that understanding: compelled State implementation of Federal policy is now an exemplar of cooperative federalism.

As we have demonstrated, 18 U.S.C. §922(s) requires Petitioner to divert resources for which he is accountable, to exceed the powers of his office, and to violate State law. He, a State officer, must consult Federal databases to ensure that Federal licensees conform to Federal law. The sole compensation given by Congress is an exposure to civil liability for error.

The United States concedes that it may not require a State legislature to act through its servants, but contends it may render that limitation superfluous by directly commanding the servants. The justification is Orwellian. Congress "respects" the role of State legislatures by usurping their constitutional functions. It "protects" their sovereignty by ordering their servants to disregard their laws. It "accepts" accountability for a program by commanding others to pay its costs. It "avoids" the creation of a national police force by nationalizing all police. More is less, usurpation of authority is deference to it, lack of discretion is freedom, shifting of blame is acceptance of responsibility.

The position of the United States seeks to nullify the results of 1787, claiming far more than even a "negative" upon State law. Its acceptance would moot the protections of *New York* and open the door to unrestricted Federal appropriation of State manpower and budgets.

ARGUMENT

I

18 U.S.C. §922(s) Violates Principles of Federalism Underscored By The Tenth Amendment.[1]

A. 18 U.S.C. §922(s) Cannot Be Justified Under Decisions Antedating *New York v. United States*, 505 U.S. 144 (1992).

1. Statutes Generally Applicable, Or Allowing Valid Alternatives.

The United States recognizes the limitation of *Garcia* to statutes of general applicability, and concedes that 18 U.S.C. §922(s) is not such a statute. Resp. Br. at 23.[2] It

---

[1] Amicus AFL-CIO argues that county officials cannot raise Tenth Amendment objections. Yet this objection was posed by a metropolitan agency in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 70 (1984), by judges in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and by counties in *New York*. Moreover, the statute here singles out "CLEOs" for its commands: Sheriff Mack has sued individually and in his capacity as CLEO. *See* Amended Complaint. Sheriff Mack further contests whether the Commerce Clause authorizes the duties placed upon him. *See also* App. 33-35.

[2] The United States contends the reason such statutes are permissible is that they involve "a clearly articulated federal

does not contest that 18 U.S.C. §922(s) denies a State the ability to avoid its mandate by altering or abandoning regulation of commerce. *Compare Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

2. Statutes Requiring Non-Discriminatory Application By State Adjudicators: *Testa* and *FERC*.

Petitioner demonstrated that the holding of *Testa v. Katt*, 330 U.S. 386 (1947), is limited to State courts having "adequate and appropriate jurisdiction under established local law" to handle claims similar to those posed by the Federal law in question. 330 U.S. at 394. Under *Testa*, "the federal law takes the state courts as it finds them." *FERC v. Mississippi*, 456 U.S. 742, 774 (1982) (Powell, J. concurring in part).

Respondent does not dispute that this standard is inapplicable to Sheriff Mack, who has no State adjudicatory powers and whose unit of government is expressly forbidden to regulate in this area. Respondent instead advances a sweeping, indeed almost unlimited, reading of *FERC*.

FERC invoked three justifications to uphold various parts of PURPA: the power to pre-empt State regulation of commerce; a *Testa* rationale, based on the Supremacy

---

policy." Resp. Br. at 23. But *Garcia* cites, as good law, the result in *Coyle v. Oklahoma*, 221 U.S. 559 (1911). 469 U.S. at 556. The law stricken in *Coyle* involved the clearest possible statement of Federal policy: the capital of Oklahoma shall not be relocated prior to January 1, 1913. 469 U.S. at 564.

Clause; and a *Hodel* rationale, based on ability of the State to avoid the mandate by withdrawing from regulation. Respondent does a delicate minuet among these sections. Its dancing partners are a pair of straw men.

The United States initially contends that *FERC*'s upholding of the "mandatory consideration" portion of §210 involved a broad holding that *any* State executive officials can be required to execute Federal law *vis-a-vis* their constituents. Resp. Br. at 18.[3] The claim ignores the Court's pivotal conclusion that the utility commission's adjudicatory duty was " 'functionally comparable' to that of a judge," 456 U.S. at 760-61 n.24. The same cannot be said of an Arizona sheriff. The officials did have *other*, truly executive, functions, but *FERC* discarded these as "of no significance" to the issue before the Court. 456 U.S. at 760.[4]

---

[3] The United States suggests that *FERC* cannot be limited to adjudicators, since the Supremacy Clause binds all officials. Resp. Br. at 18, n.9. The Supremacy Clause refers, however, to laws made pursuant to the Constitution: the argument is circular.

Respondent quotes, not the Supremacy Clause, but a truncated version of the Oaths Clause which omits the italicized words: "*The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and* all executive and judicial officials, shall be bound by Oath or Affirmation, to support this Constitution. . . . " U.S. Const., Art. VI, cl.2. The redaction obscures the clash with Respondent's construction of *New York* as protecting legislative but not executive functions.

[4] Respondent analogizes the situation to that posed by a Federal limitation on product liability. Resp. Br. at 16 n.7. A closer analogy would be a Federal command that county attorneys and their investigators examine all product liability

Respondent turns next to *FERC*'s treatment of the remaining, "implementation," mandates. It contends that the State's ability to avoid these by ceasing to regulate interstate commerce "played no role in the Court's analysis." Resp. Br. at 19 n.10. Of course: the "implementation" mandate was not sustained on that basis but under a *Testa* rationale, *FERC*, 456 U.S. at 759-60. It was of the *remaining* sections of PURPA that the Court noted: "[I]f a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals," *Id.* at 764.

Testa and *FERC* are thus completely inapposite to the mandate now before the Court. Sheriff Mack's State duty is not "functionally comparable to that of a judge." Unlike a court, he is held accountable for the use of prosecutorial discretion and for focusing his resources on the right priorities. Unlike a court of general jurisdiction, the Sheriff's Office is not engaged in resolution of legal disputes and cannot "simply open[ ] its doors to claimants." *FERC*, 456 U.S. at 760. Its functions are specified in statute, and are limited to specific enforcement functions such as apprehending offenders, preventing affrays, and supervising the jail. A.R.S. §11-441. Even the governmental unit it serves has only the powers delegated by statute; these are precisely given and narrowly construed. *Davis v. Hidden*, 124 Ariz. 546, 606 P.2d 36 (1979).[5] Indeed,

---

cases, determine which would be barred by the Federal statute, and intervene to move for their dismissal.

[5] *See also* Op. Ariz. Att'y Gen. 68-14 (county has no power to impose curfew law); Op. Ariz. Att'y Gen. 57-60 (no power to impose regulations against public intoxication); Op. Ariz. Att'y Gen. 57-23 (no power to require fencing of land).

Sheriff Mack and his county have long been forbidden to consider analogous state policy issues. *See* A.R.S. §13-3108 (barring county from regulating firearms sales).

B. 18 U.S.C. §922(s) Violates The Parameters Of Federalism As Recognized By This Court In *New York v. United States.*

1. 18 U.S.C. §922(s) Imposes Substantial, Non-ministerial Duties Upon State Officials, In Violation of the Tenth Amendment.

Respondent contends that the duties of the CLEO are minimal, Resp. Br. at 32 *ff.*, although it does not contest the evidence below that they imposed 1-2 man-hours work per day on Mack's small and overstretched office. To meet only the minimum standard, 18 U.S.C. §922(s)(2), 59 Fed. Register 9498 (Feb. 28, 1994), Sheriff Mack must for each request initiate computer contact with two Federal criminal databases plus his own State database.[6]

A "hit" may only begin the CLEO's task. A felony conviction is no bar if civil rights have been restored, 18 U.S.C. §921(a), and to deny a purchase improperly subjects the CLEO's jurisdiction to a federal cause of action. 18 U.S.C. §925A. Under applicable Ninth Circuit law, a CLEO would be required to assess an out-of-state restoration to determine whether residual restrictions on voting,

---

[6] During the pendency of this appeal, Respondent has worked to bring still more databases within the CLEO's duties. *See* 60 Fed. Register 10,784 (Feb. 27, 1995) (Requiring aliens to report their registration number on Brady form, to "enable INS to conduct computer checks" at CLEO request).

jury duty, or public employment treat the recipient as "less than a full member of society." *United States v. Oman*, 91 F.3d 1320, 1322 (9th Cir. 1996).

If duties imposed are not minimal, they are also not ministerial. A comparison with *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), is instructive. *Branstad* held that mandamus would lie to enforce the duties expressly placed on State executives by the Extradition Clause, U.S. Const. Art. IV, §2. The Court noted:

> . . . [T]he nature of the obligation here is to avoid many of the problems with which federal courts must cope in other circumstances. That this is a ministerial duty precludes conflict with essentially discretionary elements of state governance, and eliminates the need for continuing federal supervision. . . .

483 U.S. at 228. The duty at issue in *Branstad* was indeed ministerial: upon receipt of a certified copy of an indictment, the State must cause the named person to be arrested and held. 18 U.S.C. §3182. It required no discretion: one simply detains the person named, leaving to the requesting State the responsibility for indicting the correct person.

18 U.S.C. §922(s) stands in sharp contrast. Under it, CLEOs must annually make a "reasonable effort" to screen millions of individuals, who are not even suspects, against a number of criteria. He must veto any purchases which he has a "reasonable basis to believe" may be barred. App. to Brief for United States, No. 95-1478, at 16a-17a. *Even the non-criminal criteria encompass*

approximately one-eighth of the adult population.[7] As shown above, a "hit" requires further investigation, balancing of evidence, and research. The very requirement that the CLEO furnish a justification for denial, in turn subject to judicial review, underscores the discretionary and sensitive nature of his acts. The conflict with discretionary elements of State governance, and the necessity of continuing oversight, is clear.

2. The Attempt to Distinguish *New York* Fails.

The United States contends that *New York* forbids its commanding a State to make policy,[8] but leaves almost unlimited scope to order State officials to execute Federal policy on the State's time.[9] The distinction is contrary to history, precedent, and reason.

---

[7] An estimated 19,500,000 American adults are forbidden to purchase due to non-conviction disabilities. The roster ranges from 14 million users of controlled substances and 2.3 million undocumented aliens, to 20,000 persons with dishonorable discharges and 9,800 who have resigned their citizenship. Identifying Persons, Other Than Felons, Ineligible to Purchase Firearms: A Feasibility Study (Bureau of Justice Statistics, May 1990) at xiv.

[8] Respondent is driven to equivocation, in an unsuccessful attempt to find a description applicable to Sheriff Mack yet inapplicable to the facts of *New York*: "to legislate," to "make policy," to "use a State law mechanism," to devise "regulatory approaches." Resp. Br. at 16, 20, 22.

[9] The United States suggests, in the hypothetical, that Congress might be barred from imposing "intolerable burdens." Resp. Br. at 31 n.22. Amici Maryland, *et al.*, would draw the line when the Federal law impairs "structural integral operations in areas of the traditional governmental functions." Amici Br. at 15.

a. Respondent's Enact/Enforce Distinction Is Contrary To The Historical Record.

In creating our federal system, the Framers rejected alike Hamilton's proposal for Federal appointment of governors and Pinckney's call for State enforcement of Federal decisions. Even drafters of the early – and broad – versions of the Virginia Plan considered application of national powers to the State executive *more* problematical than their application to the legislature. In April, 1787, Madison advised Washington that he considered the negative on State legislation as "absolutely necessary," but that "the national supremacy in the Executive departments is liable to some difficulty, unless the officers administering them could be made appointable by the Supreme Government." 1 Letters and Other Writings of James Madison 288-89 (1865). The Convention agreed, rejecting proposals to have Federal law "carried into execution" by State executives. *New York*, 505 U.S. at 164-66. Forced execution posed, in its most aggravated form, the problem of "coercion" which the Convention sought to avoid.

We presume that neither the United States nor its amici seek an overruling of *Garcia*: yet *Garcia* turns precisely on the conclusion that this manner of reasoning formed an unworkable basis for a jurisprudence of federalism.

b. Respondent's Enact/Enforce Distinction Runs Contrary To The Holding of *New York*.

As Petitioner demonstrated, Pet. Br. at 27, the statute at issue in *New York* gave three alternative modes of compliance, two of which (executing a compact or using State facilities for disposal) required no State regulation of private conduct. This Court explained its used of "administer" when it held all three alternatives deficient: "This line of reasoning, however, only underscores the critical alternative a State lacks: A State may not decline to administer the federal program." 505 U.S. at 176-77.

The United States attempts to evade this clear counsel by suggesting that the *New York* statute involved compulsion "to create a State law mechanism to address the national problem." Resp. Br. at 22. It sidesteps –over a cliff. 18 U.S.C. §922(s) has precisely the effect described: State officials are compelled to resolve a problem foist upon them by Congress, and are held accountable for paying the resulting expenses, diverting the necessary manpower, and accounting to the voters for the priorities that consequently remain unmet. Sheriff Mack has no budget or mechanism for the required actions. J.A. at 9, nor can his Supervisors give him one without exposing themselves to personal liability. Pet. Br. at 7; A.R.S. §§11-641, 642.

c. Respondent's Distinction Runs Contrary To The Reasoning of *New York*.

The United States contends that accountability concerns are not raised by the statute at issue, since Congress

has dictated a "clearly articulated solution" Resp. Br. at 21. The United States misses the crux of the issue. The accountability problem recognized in *New York* did not lie in the risk that citizens would believe the State had enacted the waste disposal statute. The problem was that they would attribute to State officials the *side effects* of the statute – the location of waste sites, the necessary expenditures and taxes, and the long-term effects of liability. The statute itself – the resolution of a problem – was something for which national legislators would claim *credit*.

Here, the side effects fall *solely* upon Sheriff Mack's shoulders. He must take officers off other duties or pay overtime. He must resolve the personnel problems when deputies refuse. J.A. at 9. He must determine whether suspicions exist with regard to an applicant, and assess whether the applicant has provided sufficient evidence to overcome them. The United States thus advises Federally licensed dealers that, should the CLEO rule that a buyer is ineligible, they are no longer involved: the problem is one between the CLEO and his constituent.[10] Nor does Congress deign to support its conscript, should the finding face a legal challenge. While the Sheriff is left to

---

[10] ATF advises Federally licensed firearms dealers:

> If a CLEO determines that a prospective buyer is ineligible to receive a firearm. . . . the licensee is no longer involved and the matter will be resolved by the prospective buyer and the CLEO.

60 Fed. Register 10,786 (Feb. 27, 1995).

mount and finance his own legal defense,[11] Congress awards a successful challenger costs and attorneys' fees, paid by the Sheriff's unit of government.

Congress' "clearly articulated solution" thus consists of thrusting the CLEO into disputes not of his making, abandoning him to his own devices, and encouraging all concerned to focus their grievances – and lawsuits – upon him. That the United States considers this an acceptance of responsibility says much – about its concept of accountability.

C. 18 U.S.C. §922(s) Presents a Far More Egregious Violation of Federalism Than Was Present in *New York*.

The United States – and all its amici – do not deny that 18 U.S.C. §922(s) is distinguishable from the statute invalidated in *New York* only in that it involves a more serious assault upon federalism. Pet. Br. at 30-35. 18 U.S.C. §922(s) presents aggravated problems of accountability, and it lacks even the process justifications advanced by the minority in *New York*. Rather than commanding a State legislature, Congress usurps the functions given that legislature by the people, of which the core is surely its ability to command *its own* servants and make policy regarding *its own* resources. The United States here asserts the capacity to effectively erase the

---

[11] While the Sheriff might *hope* that the County Attorney would undertake his defense, the liability arises out of a Federal and not a county activity. In fact, as noted above, he undertakes the duty in violation of State law.

power and substance of the State whenever State priorities, for use of its own resources, do not agree with those of Congress.

18 U.S.C. §922(s) commands Sheriff Mack to violate the restrictions placed on his office by the people of his State. It establishes a Federal override on the people's ability to choose their officials, an ability which lies at the heart of republican government. *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900); *cf. U.S. Term Limits v. Thornton*, 115 S.Ct. 1482 (1995).

D. There Is No Historical Precedent For The Imposition Of Federal Duties Upon State Officers Pursuant To The Commerce Clause.

Respondent attempts a historical justification of its position, arguing that the first Congresses made use of State officials in achieving Federal objectives. Resp. Br. at 24-30. As demonstrated by amici Council of State Governments and Law Enforcement Alliance of America, the examples cited involved provision of *voluntary assistance* by the States to the new Republic: to help in a barn-raising does not make one a serf.[12]

---

[12] The United States quotes at length the fears of Patrick Henry and other antifederalists. Br. at 26 n.13. But these stalwarts *lost* the debate of 1788, largely because the federalists argued that their fears were chimerical – at best, "the honest errors of minds led astray," Federalist No. 1 (Hamilton). On the other hand, Madison's drive for a bill of rights was largely motivated by a desire to undercut the arguments of "Mr. Henry and his friends in Virginia" for a second convention. 1 Letters and Other Writings of James Madison 418, 442-43 (1865).

1. Voluntary, Part-Time Employment Of State Employees By The Federal Government.

Respondent invokes Hamilton's suggestion, in Federalist No. 36, that the Republic might make use of experienced State officials. Resp. Br. at 27. Hamilton in fact envisioned their voluntary hiring: they will be "attached to the Union by an accumulation of their emoluments." *Id.* The early Republic took his advice – and plunged into federalism's first crisis, one contemporaneous with the Tenth Amendment's ratification. *See generally* U.S. Constitution Sesquicentennial Comm'n, History of the Formation of the Union Under the Constitution 436-45 (1941) [Hereinafter "History of the Formation"].

Virginia, under Patrick Henry's leadership, led the objectors. By act of December 8, 1788, it forbade most State officials to hold any "lucrative office" in the national government. 12 Hening's Statutes at Large 694-95. Others followed: between 1789 and 1791, legislatures in Pennsylvania, Connecticut, New York and Maine discharged State officials who accepted Federal posts. History of the Formation at 438-42.

Other States constitutionalized the prohibition. *See, e.g., Ga. Const.* Art. I §10 (1789) (legislators forbidden to hold any Federal "office of profit"), *Pa. Const.* Art. I §5 (1790) (governor forbidden to hold "any office" of United States); *S.C. Const.* Art. II §2 (1790) (holder of any State "office or commission" barred); *Md. Const.*, Amend. II (1792) (holder of any Federal "office of trust or profit" forbidden to hold any "office of trust or profit under this

State"); *Del. Const.*, Art. II §§5, 8 (1792) (governor and legislators); *Ky. Const.* Arts. I, II (1792) (same).[13]

The fate of Hamilton's suggestion over the period 1788-92 casts doubts on suggestions that the States which were then ratifying the Tenth Amendment would have intended to allow conscription of their officials.

2. Naturalization.

Naturalization was and is a judicial function involving assessment of a petition in light of the evidence. *See Stark v. Chesapeake Ins. Co.*, 11 U.S. (7 Cranch) 420 (1813). Pre-Constitutional State law commonly provided for reporting by the clerk to the executive, upon payment of a fee. *See* Laws of Session of October, 1786, Ch. 5, §2, 12 Hening's [Virginia] Statutes at Large 260-61 (clerks to give certificate to applicant and report naturalizations to the governor, upon payment of one dollar). The Constitution expressly empowered Congress to "establish an uniform Rule of Naturalization." U.S. Const., Art. I, §8, cl. 4. The Fifth Congress accordingly required clerks to certify naturalizations to the Secretary of State, in exchange for two dollars; any clerk "to whom such fee shall be paid or tendered, who shall refuse or neglect to make a certify such an abstract, as aforesaid, shall forfeit and pay the sum of ten dollars." Act of June 18, 1798, §2, 1 Stat. 567. The early naturalization laws thus involved a judicial function, an express power, and compensation.

---

[13] *See* William Swindler, Sources and Documents of United States Constitutions (1973), vol. 2 at 209, 452; vol. 4 at 144-45, 384, vol. 8 at 289, 479.

In sum, the position of the United States conflicts with precedent, history, and reason – not to mention with its past positions taken in this Court. 18 U.S.C. §922(s) is violative of principles of federalism recognized by the Tenth Amendment.

II

The Commerce Power Does Not Justify A Federal Mandate That A State Official, Precluded By Statute from Interfering With Commerce, Regulate Commerce To Federal Specification.

18 U.S.C. §922(s) attempts to regulate, not commerce, nor State interference with commerce, but a State official who is *not interfering* with commerce – indeed, an official whose people have by law forbidden him to affect the relevant commerce. The command far exceeds Congressional powers.[14]

Unable to advance a justification, the United States simply claims that the argument adds nothing to the Tenth Amendment objection. Resp. Br. at 40-41. It does not contend that Sheriff Mack engages in the relevant commerce, that he regulates it, or even that he would have power to regulate it if he so chose.

---

[14] The issue does not arise in pre-*New York* cases because they involved either State activity in commerce – as in *Garcia* – or States affirmatively affecting commerce through regulation – as in *FERC* and *Hodel*. Indeed, the situation here is the converse of that presented in *FERC*, and Respondent's position is the equivalent of asserting that, even if the State had no utility commission, Congress could force it to establish one so that Congress might impose mandates upon it.

New York stands for two propositions: the Commerce Clause gives Congress the power to regulate, not to command others to regulate; and the core principles of federalism specifically bar commanding *States* to regulate.[15] These are "distinct limitations on federal power," *FERC*, 456 U.S. at 773 (Powell, J., concurring),[16] and the link to the commerce power is the "jurisdictional prerequisite" in this context. *Hodel*, 452 U.S. at 311 (Rehnquist, J., concurring). If anything, the case here is clearer than that presented in *New York*. There, the State – to whom the Federal command was directed – at least had the authority to regulate the relevant commerce. Here, Sheriff Mack has none; the State laws which create his position specifically deny it the required powers.

The United States invokes the Necessary and Proper Clause, U.S. Const., Art. I, §8, cl. 18. Br. at But this is "not of itself a grant of power." *Kinsella v. Singleton*, 361 U.S. 234, 247 (1960). *Compare Solorio v. United States*, 483 U.S. 435, 441 (1987) (plenary power to regulate the "land and Naval forces") *with Toth v. Quarles*, 350 U.S. 11, 22 (1955) and *Reid v. Covert*, 354 U.S. 1, 20-21, 30 (1957) (Necessary and Proper Clause does not authorize court martial of

---

[15] *New York* reminds us that, while we may refer to the latter as the Tenth Amendment bar, the limit is not derived from the text of that amendment, but from the nature of the federal system created by the Framers. 505 U.S. at 156-57.

[16] If demonstration of an Article I power necessarily defeated all federalism objections, there would have been no reason for *Garcia* to posit a "process" bar in the commerce context, nor for *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987), to posit such bars to use of the spending power.

discharged soldiers, nor of civilian dependents on overseas bases.).

III

THE UNCONSTITUTIONAL PORTIONS OF 18 U.S.C. §922(S) CANNOT BE SEVERED FROM THE VALID PORTIONS.

The United States asserts that Petitioner's severability contention involves assertion of *jus tertii*. The issue of severability was vigorously argued below, and decided by the District Court, App. at 46, without the United States raising this claim. The limitations on assertion of *jus tertii* are a prudential aspect of standing. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).[17] To allow their assertion for the first time in this Court would "foster repetitive and time-consuming litigation under the guise of caution and restraint." *Craig v. Boren*, 429 U.S. 190, 194 (1976).[18]

---

[17] Insofar as the plaintiff has suffered harm in fact, whether or not that injury is justiciable. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989). Petitioner must, under severed statute, either labor, unpaid, or alienate his constituents by causing a five-day wait.

[18] The United States mechanically applies the severability clause of the 1968 Gun Control Act, 18 U.S.C. §928, Resp. Br. at 46: §922(s) is codified as an amendment to that Act, hence the severability clause must apply. But a severability clause's value lies in the guidance it gives as to legislative intent. That Congress intended the provisions of its 1968 enactment – dealer licensing, bars on prohibited purchasers, and so on – to be severable can give little guidance as to Congress's intent in 1993 when it created components of an entirely novel background check system.

A. Severance Would Yield A Statute Which Congress Refused To Enact.

The United States speculates that Congress *might have* been willing to accept a voluntary check as a lesser measure. As we have noted, the 103d Congress four times rejected a voluntary check; legislators endorsed the mandatory approach and emphasized that they were *not* voting for a waiting period or optional check. The situation presented is the polar opposite of that presented in *Alaska Airlines v. Brock*, 480 U.S. 678 (1987), where Congress "paid scant attention" to the invalid one-house veto. 480 U.S. at 691.[19]

B. Severance Would Yield A Statute With Disadvantages Which Congress Did Not Weigh.

We have noted that severance would result in a radically different cost-benefit balance, one noted by legislators, and in special disadvantages which the 103d Congress had no reason to weigh. Pet. Br. at 42-44. The United States makes no response.

---

[19] Respondent suggests that legislators might have viewed the "waiting period" as an objective. But the period ends with the check, and vanishes entirely with the permanent Federal system. It is a means rather than an end, and the bill's supporters stressed that the wait would end as soon as possible. 139 Cong. Record H9101 ("5-day waiting period will sunset"); H9102 ("a Federal waiting period will disappear."); H9107-08 ("the waiting period will be eliminated"); H9129 ("Background checks work. Waiting periods do not."); H9097 ("an interim step that will sunset.").

C. Severance Would Create A Statute Containing Inconsistencies And Incongruities.

Petitioner illustrated how severance results in a statute with incongruities, *e.g.*, the Federal rule would allow a voluntary check, yet to gain exception a State must enact a mandatory check. Pet. Br. at 44-45. Amici Senators suggest – without evidence – that Congress meant to draft to the edge of its constitutional power. Amici Br. at 25, n.14. Yet comparison with the H.R. 7 shows that, when Congress *did* intend to impose a voluntary Federal check, it *did* reconcile the provisions, exempting any State with a waiting period that enabled a voluntary check. H.R. 7, 102d Cong., 1st Sess., §2(a).

CONCLUSION

18 U.S.C. §922(s) exceeds commerce powers and violates core principles of federalism. It must be stricken in its entirety.

Respectfully submitted,

DAVID T. HARDY

Attorney for Petitioner